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No. 07-891

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In The

Supreme Court of the United States

NANCY ALEXANDER, et al.,
Petitioners,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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ARGUMENT

I. THE COURT SHOULD CONSIDER THIS CASE ON THE MERITS, POSSIBLY IN CONJUNCTION WITH *AMSCHWAND v. SPHERION CORP., et al.*, No. 07-841.

This case involves the question of whether Section 502(a)(3) of ERISA authorizes a district court to reinstate an employee to plan benefits when an employer violates ERISA (specifically, in this case, the non-discrimination provisions of Section 510 of ERISA). The petitioners filed their petition on January 3, 2008. In the petition, the petitioners requested that the Court grant the petition and decide this case on the merits or, in the alternative, to grant the petition and remand to the Court of Appeals upon a relevant decision in *LaRue v. DeWolff, Broberg & Assoc.*, No. 06-856. Since that date, the Court has decided *LaRue* on grounds unrelated to the issues presented in this case, *LaRue*, 128 S. Ct. 1020 (2008), and the Court has requested that the Solicitor General submit a brief regarding the propriety of issuance of the writ in *Amschwand v. Spherion Corp., et al.*, No. 07-841, which contains an issue presented that is similar to the issue raised in this case. Because of the developments in the Court since the petition was submitted, this supplemental brief is submitted pursuant to Rule 15.8.

The petitioners respectfully submit that the Court should issue the writ in this case for a decision on the merits. This case and *Amschwand* each involve similar concerns: when may a district court under Section 502(a)(3) of ERISA grant a remedy that costs

a defendant money? But *Amschwand*, like *LaRue*, is concerned with the remedy known as "surcharge," whereas this case concerns the remedy of "reinstatement-to-benefits" and a different split among the Courts of Appeals. While each remedy is similar, because they require the expenditure of money by defendants, there are differences in the development of the law with regard to each type of remedy that should aid the Court in clarifying the correct interpretation of Section 502(a)(3).

1. The Court has already decided a case, *Varity Corp. v. Howe*, involving the propriety of a reinstatement-to-benefits remedy, implicating the principle of *stare decisis* in a way that is not present in *Amschwand*.

In their petition, the petitioners in this case respectfully submitted that the Court has already decided a case, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), holding that a reinstatement-to-benefits remedy is "appropriate equitable relief" under Section 502(a)(3). Petition at 10. The Solicitor General, in support of the petition in *Amschwand*, supports that reading of the Court's prior decision:

> [I]n *Varity Corp.*, 516 U.S. at 512, the Court stated that Section 502(a)(3) is a "catchall" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Based on that understanding the Court held that Section 502(a)(3) authorized the reinstatement of the plaintiff employees to a

> plan that they had been tricked into leaving by the plan fiduciary.

Brief of the Solicitor General in *Amschwand*, No. 07-841, at 10, n. 3.

In contrast, the Court has not decided a case to date involving the "surcharge" remedy, as was presented in *LaRue* and now is present in *Amschwand*. For that reason, the surcharge cases have, in the Courts of Appeals, focused on the application of *Mertens v. Hewitt Assocs.*, 508 U.S. 249 (1993), and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), to the "surcharge" remedy, whereas the reinstatement-to-benefits cases (*Mathews v. Chevron*, 362 F.3d 1172 (9th Cir. 2004)[1], and this case) have focused on the proper interpretation of *Varity Corp.* By taking this case, whether alone or in conjunction with *Amschwand*, the Court can clarify the proper interpretation of Section 502(a)(3) by specifically considering the principle of *stare decisis*.

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[1] Probably because that case does not involve the "surcharge" remedy, the Solicitor General did not cite the Ninth Circuit's decision in *Mathews* in his brief in support of certiorari in *Amschwand*. Regardless of whether the Court decides to grant certiorari in *Amschwand*, the clear split between the Ninth Circuit in *Mathews* and the Sixth Circuit in this case, regarding the current availability of the reinstatement-to-benefits remedy, remains stark.

2. The remedies involved in *Amschwand* and this case have different historical foundations, which may affect the Court's interpretation of Congress' intent in Section 502(a)(3).

This case involves not just the principle of *stare decisis* but an examination of the principles of basic equity jurisprudence.

The arguments regarding the propriety of "surcharge" under Section 502(a)(3) are strongly tied to arguments regarding legal history: was "surcharge" a remedy that was "historically available to a court of equity." See *Amschwand*, No. 07-841, Brief of the Solicitor General in Support of the Petition at 10-15. The propriety of the remedy of reinstatement-to-benefits, however, requires an examination of the application of *principles of equity* -- such as, "Equity will not suffer a wrong without a remedy." *Cf.*, *Varity Corp. v. Howe*, 516 U.S. at 515, "We are not aware of any ERISA-related purpose that a denial of a remedy would serve."

If this Court were to only examine the propriety of "surcharge" under Section 502(a)(3), then the argument may tend to focus solely on a legal formalism: "Is this remedy one that the plaintiff can explicitly point to in an old equity treatise?" With the reinstatement-to-benefits remedy presented in this case, in contrast, the Court will necessarily confront the question of how historically rigid it will define, and constrain, Congress' use of the term "equitable relief." Because, ultimately, the question in these cases is one of determining Congress' intent in Section 502(a)(3),

the petitioners respectfully submit that the full range of options that Congress could have meant in Section 502(a)(3) -- including a fuller view of equity jurisprudence -- is specifically presented in this case for the Court's consideration.

3. Deciding this case and *Amschwand* together should result in a superior, more relevant and applicable, decision by the Court.

By hearing *Amschwand* and this case together, the Court will be able to provide superior clarification of the proper interpretation of Section 502(a)(3). The Court's consideration and explanation of all of the Court's 502(a)(3) cases, including specifically *Varity Corp.* as well as *Mertens* and *Great-West*, will provide greater clarity in the law. (It will certainly clarify the remaining viability, if any, of *Varity Corp.*) Furthermore, by examining these two different remedies, which have very different legal foundations and histories, the Court's ultimate decision will be broader and more applicable to future cases. By being rooted in two different, yet very clear, remedies and factual situations, the reach of the Court's ultimate interpretation of Section 502(a)(3) will be clearer, and easier to apply by the lower courts.

CONCLUSION

Review of this case will permit the Court to consider the application of the principle of *stare decisis* when interpreting Congress' intent in Section 502(a)(3). This case will also provide the Court the opportunity to examine Congress' use of the phrase "other appropriate equitable relief" in Section 502(a)(3) in the context of a broader view of equity jurisprudence, and it will allow the Court to issue a broader, yet more applicable and specific, interpretation of Section 502(a)(3). For these reasons, as well as the reasons in the Petition and Reply Brief, the petition for writ of certiorari should be granted. The writ should issue, and the Court should resolve the split among the courts of appeals regarding the reinstatement-to-benefits remedy under Section 502(a)(3) by deciding this case on the merits, possibly in conjunction with *Amschwand*. In the alternative, and to the extent that the Court clarifies the proper interpretation of Section 502(a)(3) in *Amschwand*, the Court should issue the writ, vacate the judgment below, and remand this case to the court of appeals for reconsideration in light of *Amschwand*. In either event, the petition should be granted.

Respectfully submitted.

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